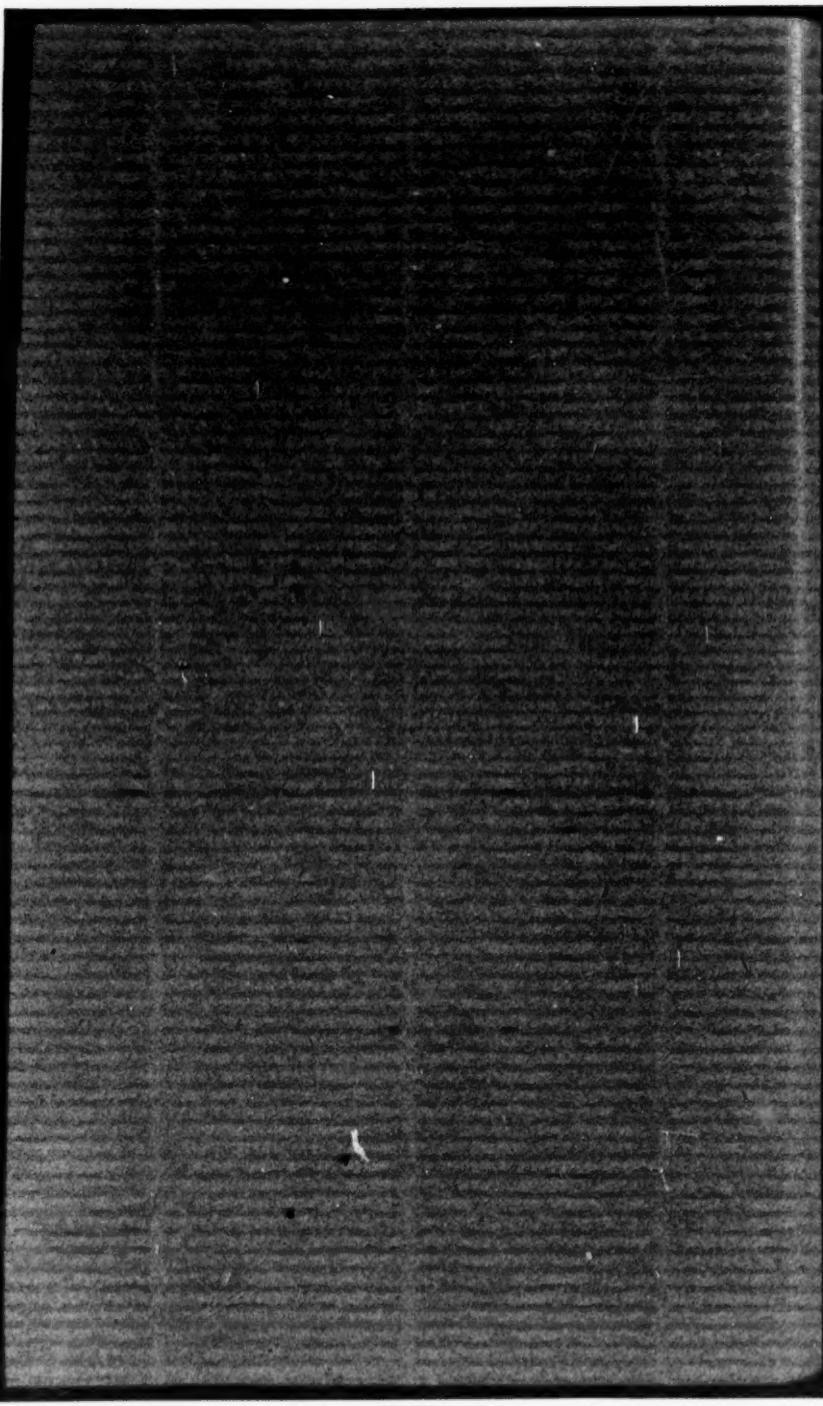

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

No. 306.

LYDIA BRADLEY, PLAINTIFF IN ERROR,

v.

H. W. LIGHTCAP, DEFENDANT IN ERROR.

IN ERROR OF THE SUPREME COURT OF THE STATE OF ILLINOIS.

Brief and Argument for Defendant in Error.

STATEMENT.

The plaintiff in error on the 26th day of May, 1902, filed the bill in this cause in the Fulton County Circuit Court of the State of Illinois, against defendant in error, to enjoin further proceedings in an ejectment suit, then pending in said court, in which the defendant in error, Lightcap, was plaintiff, and plaintiff in error, Mrs. Bradley, was defendant. The ejectment suit was first tried at the March term, 1896, of said court, at

which trial the defendant was found not guilty, and judgment was rendered against the plaintiff for cost, from which an appeal was taken to the State Supreme Court. At the October term, 1898, the State Supreme Court handed down its opinion, reversing the judgment of the lower court, and remanding the cause for further proceeding in accordance with the views expressed in its opinion. The defendant, Mrs. Bradley, at the same term of the Supreme Court filed her petition therein for a rehearing, which the Supreme Court granted, and the cause was thereupon reargued before that court and at the October term, 1899, of said Supreme Court, that court affirmed its former opinion. Afterward, of its own motion, the Supreme Court granted a second rehearing this was done on the motion and petition of Mrs. Bradley's counsel in which they assumed to act as *amicus curiæ*, and filed an extended petition and argument, as they had no right to a second rehearing, the court granted it as of its own motions, and the cause was again argued before the Supreme Court at its February term, 1900. At the October term, 1900, the Supreme Court handed down a final opinion adhering to its order reversing the judgment of the lower court and remanding the cause for further proceeding in accordance with the views therein expressed.

The bill then sets out the subsequent proceedings in the lower court in the ejectment suit, the retrial thereof which resulted in a finding and a judgment against her, that she had paid the cost and taken a new trial under the statute, and that the suit was, at the time she filed her bill, then pending for such new trial. The bill then avers that the controversy involved in the litigation in the ejectment suit was as to the "effect of the statute of the State of Illinois, Section 38, Chapter 77, approved March 22, 1872, in force July 1, 1872," setting forth a copy of the statute referred to. The bill then sets forth a part of the opinion of the State Supreme Court in the ejectment suit which is objected to (Printed Record, pp. 10 to 12). The bill then sets forth her version of the law of Illinois relating to mortgages, and its application to

the questions involved in the ejectment suit, and claims that the statute referred to as construed by the State Supreme Court in the ejectment suit, if enforced against her, "would impair the obligation of the contracts of the said [illegible] to [illegible], contrary to Section 10 of Article I of the Federal Constitution, and that the statute as construed deprives her of vested right and title to the property, which she claims she had, contrary to Sections 1 and 2 of the Fourteenth Amendment to the Federal Constitution, and for these reasons the Blue Ice bill and seeks to enjoin the ejectment suit, and asserts as a cloud upon her alleged title, the title claimed by the plaintiff in ejectment suit.

[illegible].

I.

A court of equity has no jurisdiction to entertain a bill to test the constitutionality of a statute, especially where the validity and construction of the statute is involved in a suit at law between the same parties and involving the same subject matter of litigation. If the statute is unconstitutional, or if the construction placed upon it by the State Supreme Court in the ejectment suit renders it unconstitutional the remedy of the plaintiff was by writ of error from the Supreme Court of the United States to the Supreme Court of Illinois in the ejectment suit in which the validity and construction of the statute was involved, as provided in Section 709 of Chapter 28, Title 28, of the Revised Statutes of the United States which affords an adequate and complete remedy at law to determine those questions. And if the statute is valid then it is as binding on a court of equity as on a court of law, and equity will follow the law in its construction.

II.

The statute complained of is a limitation statute and as held to be by the State Supreme Court and enforced

as such. It does not contravene Section 10 of Article 1 of the Federal Constitution, nor Sections 1 and 5 of the Fourteenth Amendment. This court has frequently passed upon similar statutes and upheld their validity. (For Illinois cases see):

Ryhiner *v.* Frank, 105 Ill., 326-330.
Peterson *v.* Emmerson, 135 Ill., 55-60.
Seeberger *v.* Weinberg, 151 Ill., 369-380.
Brown *v.* Ridenhower, 161 Ill., 239, 240-242.
Lightcap *v.* Bradley, 186 Ill., 511, 515-536.
Bradley *v.* Lightcap, 201 Ill., 510, 512-524.
Bradley *v.* Lightcap, 202 Ill., 154, 155-168.

(For cases in this court see):

Wheeler *v.* Jackson, 137 U. S., 245, 255, 258.
Jackson *v.* Lamphier, 3 Pet., 280, 290.
Turner *v.* New York, 168 U. S., 90, 94.
Terry *v.* Anderson, 95 U. S., 628, 632.
Saranac L. Co. *v.* Comptroller, &c., 177 U. S., 318, 330.
Vance *v.* Vance, 108 U. S., 514, 519.
Koshkonong *v.* Burton, 104 U. S., 668, 675.
Iowa Central R. R. Co. *v.* Iowa, 160 U. S., 393.
Davidson *v.* New Orleans, 96 U. S., 102.
Missouri Pacific R. R. Co. *v.* Humes, 115 U. S., 512, 518.

III.

In Illinois the title to land mortgage is never out of the mortgagor, except as between him and the mortgagee, and then only as an incident of the mortgage debt for the sole purpose of obtaining satisfaction. As to all other persons and for all other purposes the mortgagor or his grantee is the legal owner of the mortgaged estate.

Fitch *v.* Pinckard, 4 Scaman, 69, 82, 83.
Sargent *v.* Howe, 21 Ill., 149.
Van Sant *v.* Allmon, 23 Ill., 30, 33.
Hall *v.* Lance, 25 Ill., 277, 281.

Harris *v.* Mills, 28 Ill., 44, 46.
Pollock *v.* Mason, 41 Ill., 516, 520.
Emory *v.* Keighan, 88 Ill., 482, 485.
Delano *v.* Bennett, 90 Ill., 533, 536.
Barrett *v.* Hinckley, 124 Ill., 46.
Lightcap *v.* Bradley, 186 Ill., 518, 524.
Ware *v.* Schintz, 190 Ill., 189.

In the case at bar before the statute had any person or anything to operate upon it had been in force over seven years as the bill shows, and the obligation of the contract had been enforced. The foreclosure and sale extinguished the trust deed, and freed the land from all lien and claims except the lien of the certificate of purchase; and from and after the sale a new relation created by the statute existed. Thereafter the plaintiff in error sustained the same relation to the property and to the mortgagor that any stranger would sustain if such stranger had been the purchaser instead of the plaintiff in error.

Ogle *v.* Koerner, 140 Ill., 170, 179, 180.
Seligman *v.* Laubheimer, 58 Ill., 124, 126.
Davis *v.* Dale, 150 Ill., 239, 243-4.
Smith *v.* Smith, 32 Ill., 198.
Raines *v.* Mann, 68 Ill., 264.
State Bank *v.* Wilson, 4 Gilm., 57, 59.
Wyman *v.* Cochran, 35 Ill., 152, 156.
Leslie *v.* Bontel, 130 Ill., 501.
Kilgore *v.* Wood, 64 Ill., 345.
U. S. Mortgage Co. *v.* Gross, 93 Ill., 483.
Walker *v.* Warner, 179 Ill., 16.
Lightcap *v.* Bradley, 186 Ill., 510.

The foregoing authorities also show that the certificate of purchase was only a lien, that no title passed to the holder of it, and that none vested in her until the deed is made, and that until the deed is made the holder of it is not even entitled to possession. The following are further authorities upon this point:

Hayes *v.* Cassell, 70 Ill., 669, 672.
Bennet *v.* Matson, 41 Ill., 332, 344.
McLagan *v.* Broan, 11 Ill., 519, 523.
Johnson *v.* Bantock, 38 Ill., 111.
O'Brien *v.* Fry, 82 Ill., 274, 277.
Rockwell *v.* Servant, 63 Ill., 425.
Huftalin *v.* Misner, 70 Ill., 55, 58.
Kelholts *v.* Wolf, 8 Ill., App. 371, 374.
Trustees of School *v.* Love, 34 Ill., App. 419, 420-1.
Whitenack *v.* Agarth, 56 Ill., App. 72, 77.

IV.

The bill on its face shows that the plaintiff in error under the law of Illinois had no legal or equitable title to support her bill.

Ryhiner *v.* Frank, 105 Ill., 326, 330.
Peterson *v.* Emmerson, 135 Ill., 55, 60.
Seeberger *v.* Weinberg, 151 Ill., 369, 380.
Brown *v.* Ridenhower, 161 Ill., 239.
Lightcap *v.* Bradley, 186 Ill., 511.
Bradley *v.* Lightcap, 202 Ill., 154.
Bradley *v.* Lightcap, 201 Ill., 510.

V.

The bill shows, and so states, that the controversy in the ejectment suit was as to the effect of the statute complained of. This involved its validity and construction, and it is the construction and effect the Supreme Court gave to it that forms the chief ground of complaint in the bill. This being true, the principles of law announced by the State Supreme Court on the appeal, in the ejectment suit and found in Lightcap *v.* Bradley, 186 Ill., 515 to 536, became the law of the case alike binding on all courts especially as to the construction and effect of the statute, until reversed by this court, which alone has supervisory power over the decisions of the State Supreme Court.

Washington Bridge Co. *v.* Stewart et al., 3 How., 424, 425.
Pease *v.* Ditto, 189 Ill., 456, 461.
Reed v. West et al., 70 Ill., 479.
Manufacturing Co. *v.* Wire Fence Co., 119 Ill., 30, 42.
Newberry *v.* Blatchford, 106 Ill., 584, 591-2.
Rising *v.* Carr, 70 Ill., 596.
Ogden *v.* Larrabee, Admr., 70 Ill., 510, 512.
Harvey *v.* Aurora & G. Ry. Co., 186 Ill., 283, 294.
Sampel *v.* Anderson, 4 Gilm., 546.

ARGUMENT.

I.

An examination of the prayer of the bill will furnish light upon what the bill is predicated. The prayer is that the defendant in error be required to convey to the plaintiff in error all his interests in the property; that he be enjoined from asserting ownership in the land, taking possession thereof, dispossessing the complainant or denying her title thereto; and alternately that he be permanently enjoined from prosecuting the ejectment suit, that the deed from Prettyman to him be ordered surrendered for cancellation; that the same be declared a cloud upon complainant's title, and that her title be declared confirmed and established by the decree of the court, and she be confirmed in her possession of the land.

This practically amounts to the destruction of the title asserted by Lightcap in the ejectment suit, and the confirmation in the plaintiff in error of a perfect indefeasible title to the premises. In other words, the prayer is, in spite of the fact that she disregarded the statute in question, and thereby lost all her claims to the premises, she is, by the decree of the court, to be invested with a perfect title.

In substance, this amounts to the annulment of the

statute in question, obviates its operation, disregards its provision, treats it as though absolutely void. Such disregard of the statute must be predicated upon the proposition that the statute is a nullity. If it is a nullity, it is because it contravenes the Federal Constitution. If it is void because it contravenes the constitution, then it will be so regarded in courts of law as well as in courts of equity. It follows therefore that if the premises upon which the relief is sought are well founded, there is no occasion to seek the aid of a court of equity. A court of law will disregard a statute that violates the constitution and a court of equity need not be called upon for that purpose. Indeed, it is not one of the heads of equity jurisprudence to inquire into the constitutionality of statutes, and to set them aside if they violate the constitution. This is especially the case where the construction and validity of the statute is involved in a suit at law between the same parties and involving the same subject-matter of litigation. The functions of a court of law are sufficiently comprehensive for that purpose. If the statute of a State violates the Federal Constitution, the courts of law of that State have perfect authority to so declare, and it is their duty to so declare in any proceeding before them where the validity of the statute arises, and if the highest court of the State erroneously upholds such statute, its action may be corrected by a writ of error from the Federal Supreme Court. Moreover, it is never deemed one of the functions of a court of equity to exercise appellate jurisdiction over proceedings of law courts. If a court of law erroneously sustains a statute, or erroneously interprets a statute, or erroneously extends the provision of a statute to cases not within its terms, this affords no ground for equitable interference. The error supposed is one of law to be corrected by a tribunal exercising purely appellate jurisdiction, and the remedy at law is perfect and complete. While on the other hand, if the State statute is valid in law it is also valid in equity, and equity will follow the law in its construction.

II.

In the second division of our brief we have called the court's attention to decisions of the Supreme Court of Illinois defining and construing the statute complained of; as we shall have occasion to refer to these cases in a subsequent part of our argument we wish here merely to refer to the fact that that court in each and every one of those cases holds the statute to be one of limitation and valid. The first of those cases was decided nearly twenty years before the bill was filed in this case, and within two years after the plaintiff in error was entitled to a deed on the certificate, leaving her three years after the decision of the Supreme Court in Frank *v.* Ryhiner *supra* in which to take her deed. She was bound to know what the law of the State was, besides that decision was notice to her and to every other citizen of the State that if they failed to comply with the plain provisions of the statute they would lose their right to a deed and would have no further right to the land described in the certificate of purchase.

That this statute did not contravene any provision of the Federal Constitution seems to us beyond question. This court has frequently passed upon the question of the validity of similar statutes and in every instance as far as we are able to find has held them to be valid. At the risk of repeating what we have already said in No. 243 on the docket of this court, of which this case is a branch, we will call the court's attention to some of the decisions of this court. In the case of *Wheeler v. Jackson*, 137 U. S., 245, the plaintiff in error, Wheeler, held a number of certificates of purchase, which entitled him to a conveyance or lease of the property called for in the certificates. At the time he purchased the property and received his certificates, the owner of the property had two years in which to redeem the same from the sale, and if redemption was not made within that time the holder of the certificates had an *absolute* right to a conveyance or lease, and the right to abide his time in calling for the conveyance. Subsequently the legisla-

ture of New York passed an act which provided that no special proceedings should be maintained to compel the execution of the conveyance upon any sale made more than eight years prior to the passage of the act unless brought within six months thereafter, and that after the lapse of six months all sales made more than eight years prior to the passage of the act *should be cancelled, and the lien of the certificate should cease.* The certificates which Wheeler held were obtained on sales made more than eight years prior to the enactment of the statute. He did not apply for any conveyance until after the expiration of the six months limitation prescribed by the act, but subsequent to the expiration of the six months he did apply for the conveyance the certificates called for. The conveyance was refused on the ground that he had lost his rights by the bar of the statute, although but for the subsequent act of the legislature his certificate would have been perfectly good and he would have been entitled to his conveyance. He brought suit to compel the execution of the conveyances which his certificates called for, was defeated in the State courts, and the case was brought to this court and it was insisted that the act of the legislature was unconstitutional as impairing the obligation of the contract, also that the act deprived him of property without due process of law contrary to the Fourteenth Amendment. But this court held the statute to be valid as a limitation statute and after stating (p. 255) that it is the settled doctrine of this court that the legislature may prescribe a limitation where none existed before as well as shorten the time for the enforcement of existing rights provided a reasonable time be given before the bar takes effect, the court speaking through Mr. Justice Harlan, said (p. 256):

"It is further contended that even if the statute is "sufficient to bar an action to compel the execution of "a conveyance to the purchaser unless brought within "the time prescribed, it is unconstitutional in that it re- "quires the Register after the expiration of six months "from its passage without any such action being com- "menced, and notice thereof given within that period--

"to cancel in his office all sales made more than eight "years prior to June 6, 1885—and provided that 'there- "upon the lien of all such certificates of sale shall cease "and determine.' That provision it is said destroys the "security upon which the purchaser relied when he ad- "vanced the money, namely, the lien of the record after "sale. This position is untenable. *The substantial "rights acquired by the purchase was a return of his "money with interest, or, after a certain time, a lease of "the premises for the term named in the certificate of "sale.* The lien created by the certificate of sale pro- "tected him during the period which the owner of the "property was permitted to redeem; and if the latter "redeemed, he could only do so, of strict right, within "a given time, and then only by reimbursing the pur- "chaser all he had paid, with the addition of 15 per cent. "per annum. If there was no redemption, the purchaser "was entitled to a lease that would give him all for "which he bargained. The lien, consequently, would "cease upon the execution and delivery to the purchaser "of the lease. If the lien was of such a character that "the purchaser, not having secured a conveyance, could "enforce it by suit or special proceedings commenced "for that purpose, the power of the legislature to pre- "scribe a period within which such suit or proceeding "must be commenced, or the lien lost, is as clear as its "power to fix the time within which the purchaser must "sue to compel the execution of a conveyance or lease. "If, on the other hand, the lien was given only to pro- "tect the purchaser in respect to his outlay with inter- "est, until he was entitled to demand a conveyance or "until a conveyance was actually made, the power of the "legislature to require the record of sale to be cancelled "and the lien to cease when the purchaser by not suing "within the prescribed time had lost his right to a con- "veyance or lease, can not be questioned."

And the court held the statute was valid and in its conclusion said, p. 258:

"A statute of limitation can not be said to impair the "obligation of a contract, or to deprive one of property "without due process of law, unless in its application to

"an existing right of action, it unreasonably limits the "opportunity to enforce the right by suit."

It appears to us that the holder of the certificate of purchase in the foregoing case of Wheeler *v.* Jackson presented to this court a much stronger case for the interposition of this court on the ground that the act was unconstitutional than is presented by the plaintiff in error in the case at bar. In the above case the sale was made and the certificates were in the hands of Wheeler in full force and effect with the right to delay taking out the conveyance unaffected by any statute when the legislature passed the limitation statute; every right which the sale, or the certificates gave were vested so far as the sale and certificates could vest the same, and the right of redemption as completely barred and gone as in the case at bar. In the case at bar the sale had not been made and the certificate had not been issued, and no right by virtue of the sale or certificate was given or vested until seven years after the statute was passed and in force. In the case of Wheeler he lost his right as purchaser by virtue of a limitation statute passed after his right had attached; in the case at bar the plaintiff lost her right as purchaser by virtue of a limitation statute which was in full force and effect at the time of her purchase. The substantial rights acquired in either case were the same. In the Wheeler case this court said:

"The substantial rights acquired by the purchase was "a return of the money with interest, or, after a certain "time, a lease of the premises for the term named in the "certificate."

The substantial rights which the plaintiff in error acquired by her purchase were the same, as the State Supreme Court said:

"The statute gave her the right to receive the amount "of her bid, with interest, in case of redemption, and in "case there was no redemption, to receive a deed within "five years after the expiration of the period of redemp- "tion."

No other right could be acquired under a valid foreclosure and sale either before, at the time, or since the

McCune trust deeds ~~were~~ was executed, except the right to receive the redemption money, if redemption be made, or a deed in case of failure to redeem.

The parties to a contract have no more vested right or interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. On the contrary, the legislature may provide a limitation where *none existed before*, as well as shorten the time within which suit to enforce existing action may be commenced, or act performed, provided a reasonable time, taking all the circumstances into consideration, be given by the legislative act prescribing the limitation for the commencement of the action or the performance of the act, before the bar takes effect.

Terry *v.* Anderson, 95 U. S., 628, was a case where the cause of action on the obligations had been running nearly four years, and under the law as it then existed, the creditor had 20 years in which to bring suit. Subsequently the legislature of Georgia passed an act limiting the period in which suit on such past due obligation should be brought by January 1, 1870, which gave the creditor only 9 months and 17 days in which to bring his action. It was insisted that the act was unconstitutional, because it impaired the obligation, and the argument was made in that case along the same line as the case at bar, that as the statute of limitation in force when the liability of the defendant was incurred did not bar the action until the expiration of 20 years from the time the action accrued, a statute passed subsequently, reducing the limitation, was such an impairment of the contract as to render the statute void. This court, however, held the act valid. Chief Justice Waite in delivering the opinion of this court said (p. 633-4): "This court has often decided that statutes of "limitation affecting existing rights are not unconstitu- "tional if a reasonable time is given for the commence- "ment of an action before the bar takes effect." (Citing Hawkins *v.* Barney, 5 Peters, 451. Jackson *v.* Lamphier, 3 Peters, 280. Sohn *v.* Waterson, 17 Wall, 596. Christian *v.* Russell, 5 Wall, 290. Sturges *v.* Crowninshield, 4 Wheat, 122.) "It is difficult to see why if the

"legislature may prescribe a limitation where *none* ex-"isted before, it may not change one which has already "been established. The parties to a contract have no "more *vested* interest in a particular limitation which "has been fixed than they have in an unrestricted right "to sue. They have no more a vested interest in the "time for the commencement of an action than they have "in the form of the action to be commenced, and as to "the form of action, or mode of remedy it is well settled "that the legislature may change them at discretion, "provided adequate means of enforcing the right re-"mains. *In all cases, the question is one of reasonable-"ness, of that the legislature is primarily the judge, and "we can not overrule the decision of that department of "the government unless a palpable error has been com-"mitted.*"

The case of Koshkonong *v.* Burton, 104 U. S., 668, 674, is if anything, a still stronger case in support of our position.

In Jackson *v.* Lamphier, 3 Peters, 281, 289-290, this court said: "It is within the undoubted power of the "State legislature to pass recording acts, by which the "elder grantee shall be postponed to a younger if the "prior deed is not recorded within the limited time, and "the power is the same whether the deed is dated *before* "or after the passage of the recording act. Though the "*effect* of such law is to render the prior deed *fraudu-"lent* and *void* as to subsequent purchasers, it is not a "law impairing the obligation of contract, such too, is "the power to pass acts of *limitation* and *their effect*.

"Reason and sound policy have led to the general "adoption of laws of both description, and their validity "can not be questioned. The time and manner of their "operation, the exceptions to them, and the acts from "which the time limited shall begin to run, will gen-"erally depend on the sound discretion of the legisla-"ture, according to the nature of the title, the situation "of the country, and the emergency which leads to their "enactment."

Vance *v.* Vance, 108 U. S., 514, was a case where the Civil Code of Louisiana, provided in respect to tutors of

minors, as follows: "The property of the tutor is "tacitly mortgaged in favor of the minor from the day "of his appointment as tutor, as security for his admin- "istration and for the responsibility which results from "it." There was a tacit mortgage under this law which had been in full force and virtue from October 15, 1859. In 1868, the State adopted a new constitution in which it provided "that no mortgage or privilege shall here- "after affect third parties unless recorded in the parish "where the property to be affected is situated. The "tacit mortgages and privileges now existing in the "State shall cease to have effect against third persons "after 1st of January, 1870, unless duly recorded. The "General Assembly shall provide by law for the regis- "tration of all mortgages and privileges."

This, the legislature proceeded to do on the 8th day of March, 1869. This court in the foregoing case, upheld the validity of that clause of the State Constitution, and in doing so said (p. 517): "It is in the nature "of a statute of limitation, the right to prescribe the "time within which existing rights shall be prosecuted, "and means by and conditions on which they may be "*continued in force* is, we think, undoubted. Otherwise, "when no term of prescription exists at the inception "of a contract, it would continue in perpetuity, and all "laws fixing a limitation would be abortive. Now, "it is elementary, that a State may establish, alter, "lengthen or shorten the period of prescription of exist- "ing rights; provided that a reasonable time be given "in future for complying with the statute."

There is nothing in principle in this statute, or in this case, differing from any other statute of limitation, or case where substantial rights are lost under a statute of limitation like the one in question. In *Sarmaac L. Co. v. Comptroller*, 177 U. S., 330, this court said:

"A statute of limitation will bar any right, however "high the source from which it may be derived, provided "a reasonable time is given a party to enforce his right."

On pp. 30, 31, of argument for plaintiff in error, it is said:

"The statute without doing any violence whatever in

"no language might have been held not retroactive, and "so inapplicable to affect vested rights or rights under "mortgage previously made, or the rights of persons in "possession of land who had no need of any master's "deed. It might have been applicable only to prevent "the issue of a master's deed leaving all existing rights "unaffected. It might have been interpreted according "to its terms, that it affected only the certificate of pur- "chase, but not the purchase itself or the deeds or "rights of the purchaser in possession. If the statute of "1872 had been so constituted as to avoid the construc- "tional objection it must have been held to have no op- "peration to the plaintiff in error who was in rightful "possession, claiming title under a contract made prior "to its passage."

What construction was given to it, other than as preventing her from getting a master's deed after five years? The statute said the certificate should be void *after five years*, and that is all the court said. The trouble is, the court did not agree with counsel as to the nature of the rights of the mortgagee, the *cestui que trust* and mortgagor, the effect of a valid foreclosure and sale upon the mortgage lien, the relation which the purchaser at the master's sale whoever he might be, whether the mortgagee, *cestui que trust*, or a stranger, thereafter sustained to the mortgage premises and mortgagor, and the rights of such purchaser to the possession of the premises before obtaining a deed from the master. These were questions quite apart from the statute complained of. They involved an inquiry as to the nature and character of a mortgage, the relation the mortgagee and mortgagor sustained to each other, and to the mortgaged premises, and to third parties; how the mortgage lien was affected by the foreclosure and sale, what relation and position the purchaser at the sale sustained, and what he thereby acquired.

These matters were as they were before the statute. The fault of the opinion, as the learned counsel say it, was the views taken by the court on those collateral subjects which we will discuss further on. It is as much *the duty* of the court to give effect to the statute of limi-

[illegible] as to any other statute which the legislature of a State may be disposed to pass and where the evil of the legislation is clearly expressed, as it was in the statute under consideration, it ought to be followed without regard to consequences.

Where was it ever held that a complainant in chancery could secure relief against [illegible] consequences of his own neglect to comply with a [illegible] requirement of a statute? Such a suitor can not gain the favor of equity. That court will not undertake to nullify the provisions of a statute merely because one who has been guilty of it is suffering in consequence thereof. "If the law "commands or prohibits a thing to be done, equity can "not enjoin the contrary or dispense with the obligation." Story's Eq. Jur., Sec. 64.

[illegible]

It does not appear quite clear in the brief and argument of the learned counsel what change in the law of Illinois they impute to the court. On page 15 of their brief and argument, they say, "In some change in the "law of Illinois made either by statute or change in the "rule of decision, or both, after the rights of the plaintiff in error became vested," the court is about to deprive her of property, etc., etc. This is quite as indefinite statement, and when we come to further examine their argument it is rendered still more so. When they get to talking about the rights of the plaintiff in error which they claim she has been deprived of in this unfortunate way, it does not clearly appear whether they refer to rights as vested pro tanto before foreclosure of the trust deed, or rights as purchaser at the foreclosure sale, and in all of their discussion they ignore the effect of the foreclosure and sale.

In order to take the case up and consider it in as orderly way [illegible] as consider the opinion of the State Supreme Court in which the bill changes, and counsel argue, the change in "some way" was made. The opinion is made a part of the bill by reference as Exhibit C [illegible], but is not copied, except a portion of it,

into the bill, nor attached, but will be found in the 186 Ill., 515 to 536.

One of the changes which they claim was made, has reference to the law of mortgages in Illinois, and what the respective rights, title and interest of the mortgagor and mortgagee in and to the mortgaged premises are and were. They claim that the mortgagee, after condition broken, "had the absolute title and estate" precisely as he had at one time in England, and that the mortgagor thereafter had no right, title or interest in the premises recognized by a court of law, and that the decision of the court in Lightcap *v.* Bradley changed the law in this respect.

Let us see, by turning to the opinion of the court and examining what the court said on pages 518-524 this court will find the State Supreme Court carefully reviewed the law of mortgages as it existed in Illinois before, at the time, and ever since the McCune trust deed was executed. That this court may have a ready reference we will quote what the State Supreme Court said in that regard, after stating that it was insisted that the trust deed was a conveyance of the fee to Johnson with only an equitable right on the part of the mortgagor to redeem; and that upon default the fee simple title was in the trustee and that such title remained in him unaffected by the foreclosure and sale (and that is practically what is insisted upon now), the court said:

"Leaving out of consideration the effect of a mort-
"gage in the statutory form, it is true that a mortgage
"or trust deed like the one in question here, which pur-
"ports to convey title, does, as between the mortgagor
"and mortgagee, convey such title; but it is only a quali-
"fied conveyance of the land, and the mortagor parts
"with the title only as security to his creditor and dur-
"ing the existence of the debt or obligation. In the de-
"velopment of the law of real estate mortgages in Eng-
"land the mortgage was at first a pledge of the land,
"usually requiring a judgment to complete a transfer
"of titles, and to invest it in the mortgagee. Afterwards
"a form of mortgage came into use which vested title of
"itself, and the pledge changed into an estate in fee

"without judicial foreclosure upon the mortgagor's de-
"fault. The mortgage vested absolute title in the mort-
"gagee upon condition broken. Courts of equity, how-
"ever, recognizing the purpose of the mortgage as
"merely a pledge to secure a debt, established a right of
"the mortgagor to redeem. They created a new estate in
"the form of the equity of redemption, and a remedy for
"the creditor to cut off this estate. A proceeding was
"devised to extinguish the mortgagor's right to redeem,
"and to vest title in the mortgagee, and this was the pro-
"ceeding now known as strict foreclosure (9
"Ency. of Pl. & Pr. 118). Equity assumed jurisdiction
"to relieve the mortgagor against a forfeiture upon de-
"fault, and he was relieved from it on payment of the
"debt. (1 Jones on Mort., Sec. 8.)

"Courts of law, following the lead of courts
"of equity, have adopted many equitable princi-
"ples as to the title of the respective parties,
"and at law the title of the mortgagee can be used only
"for the purpose of securing his equitable rights under
"it 'as to all persons except the mortgagee and those
"claiming under him it is everywhere the established
"modern doctrine that a mortgagor in possession at law
"both before and after breach of condition is the legal
"owner.' (Jones on Mort., Sec. 11.) In many of the
"States a mortgage confers no title or estate, and it is
"nothing but a mere security for a debt or obligation.
"This State has adhered to the rule that at law a title
"vests in the mortgagee, but only for the protection of
"his interests. For the purpose of protecting and en-
"forcing his securities, the mortgagee may enter and
"hold possession by virtue of his title, and take the rents
"and profits in payment of his mortgaged debt. He may
"maintain the possessory action of ejectment on the
"strength of such title, but the purpose and effect of the
"action is not to establish or confirm title in him, but, on
"the contrary, to give him the rents and profits which un-
"dermine and destroy his title. (U. S. Mort. Co. *v.*
"Gross, 93 Ill., 483.) When the rents and profits have
"paid the mortgaged debt both the title and right of pos-
"session of the mortgagee are at an end.

"The mortgagor's interest in the land may be "sold upon execution; his widow is entitled to "dower in it; it passes as real estate by his de- "vise; it descends to his heirs, by his death, as real es- "tate; he is a free holder by virtue of it; he may main- "tain an action for the land against a stranger, and the "mortgage can not be set up as a defence. The mort- "gagee has no such estate as can be sold on execution; "his widow has no right of dower in it; upon "his death the mortgage passes to his personal "representatives as personal estate, and it passes "by his will as personal property. (1 Jones on "Mort., Sec. 15.) The title of the mortgagee, even af- "ter condition broken, is not an outstanding title of "which a stranger can take advantage, but it is availa- "ble only to the mortgagee or one claiming under him "(*Hall v. Lance*, 25 *Ill.*, 277). The mortgagor may sell "and convey his title or mortgage it to successive mort- "gagees, and his grantees or mortgagees will succeed to "his estate and occupy his position subject to the incum- "brance.

"*Fitch v. Pinckard*, 4 Scam., 69, was an action of "ejectment, and there was a question whether the equity "of redemption was liable to execution and would pass "to the purchaser at the execution sale. The court hold- "ing that it would pass said that the earliest doctrine "in England settled that the whole estate was in the "mortgagee, but that the strictness of law had yielded "to the principles of justice and equity and the doctrine "held in the United States in regard to the estate of the "mortgagor is that he is to be treated as the real owner "of the estate for all beneficial purposes, subject only to "the right and incumbrance of the mortgagee.

"*Cottingham v. Springer*, 88 *Ill.*, 90, was also an ac- "tion of ejectment, where the same question arose, the "court cited *Fitch v. Pinckard*, *supra*, and reiterated "what was there said. After referring to the common "law rule and that the mere equitable rights of the mort- "gagor could not be sold on execution the court said (p. "93): 'But many of the States—and ours of the num- "ber—have by enactment made great modifications of

"the rule. Our legislature at an early day provided "that when the mortgagor paid and satisfied the debt, "and the mortgage had been recorded he might compel "the mortgagee to enter satisfaction of the mortgage on "the margin of the record which should operate as a dis-"charge and release of the same, and forever bar all ac-"tion that might be brought thereon. This provision is "found in the act establishing recorder's office (Pub. "Laws 1819, p. 19, Sec. 5), and has been continued in "force ever since. This was a most material modifica-"cation of the common law rule, as it reinvested the "mortgagor with the title simply by the mortgagor "stating, over his signature, on the margin of the record, "that he had received satisfaction of the debt, and dis-"pensing with a release or reconveyance for the pur-"pose.' The court also said that the provisions for a "foreclosure at law by *scire facias* and sale of the prop-"erty under an execution at law recognized the equity "of redemption as an interest or title that might be sold "on execution subject to the same incidents that other "sales of real estate are under when sold under ordinary "executions at law.

"*In Barrett v. Hinckley, 124 Ill., 32*, which was an ac-"tion of ejectment by Hinckley *v.* Barrett and others "the courts held that the title of the mortgagee existed "only for the benefit of the holder of the mortgage in-"debtedness, and can only be asserted by an action in "furtherance of his interest as a means of coercing the "payment of the debt; that if a mortgagee conveys the "mortgaged premises without assigning the debt, the "grantee will hold the legal title in trust for the holder "of the debt, and that the mortgagee's interest as dis-"tinct from the debt has no determinate value and is "not fit subject for assignment. The court also says "(p. 46):

"'It must not be concluded from what we have said "that the dual system respecting mortgages as above ex-"plained, exists in this State, precisely as it did in "England prior to its adoption in this country, for such "is not the case. It is a conceded fact that the equitable "theory of a mortgage has, in process of time, made in

"this State, as in others, material encroachments upon "the legal theory which is now fully recognized in courts "of law. That it is now the settled law that the mort- "gagor or his assignee is the legal owner of the mort- "gaged estate as against all persons except the mort- "gagee or his assignee (*Hall v. Lance*, 25 Ill., 277; "*Emory v. Keighan*, 88 Ill., 482). As a result of this "doctrine, it follows that in ejectment by the mortgagor "against a third party, the defendant can not defeat the "action by showing an outstanding title in the mortgagee. "(Hall *v.* Lance), so, too, courts of law now regard the "title of a mortgagee in the nature of a base or deter- "minable fee. The term of its existence is measured by "that of the mortgage debt. When the latter is paid off, "or becomes barred by the statute of limitations, the "mortgagee's title is extinguished by operation of law "(*Pallock v. Maison*, 41 Ill., 516; *Harris v. Mills*, 28 id. "44; *Gibson v. Rees*, 50 id. 383). Hence the rule is as "well established at law as it is in equity, that the debt "is the principal thing, and the mortgage an incident.'

"The mortgagee is legal owner for only one purpose, "while at the same time the mortgagor is the owner for "every other purpose and against every other person. "The title of the mortgage is anomalous and exists only "between him and the mortgagor and for a limited pur- "pose.

"*Delano v. Bennett, 90 Ill., 533*, was an action of "ejectment, E. T. Warren, the owner of two-fifths of the "land in controversy, mortgaged the same to the Ken- "nebec Bank of Maine. The bank conveyed said two- "fifths interest to Benjamin Wales and others, and "Delano claimed the same through mesne conveyances "from the grantee of the bank. It was held that the deed "from the bank purporting to convey this two-fifths in- "terest did not convey anything and the court said (p. "536) 'the mortgage is deemed a mere incident to the "mortgage debt and the conveyance of the interest of the "mortgagee in the land without an assignment of debt "is considered in law a nullity.' The title is never out "of the mortagor except as between him and the mort- "gagee and as a incident of the mortgage debt for the

"purpose of obtaining satisfaction. When the debt is "barred by the statutes of limitation the title of the "mortgagee or trustee ceases at law as well as in equity. "When the debt, the principal thing is gone, the incident, "the mortgage, is also gone. (*Pollock v. Maison*, 41 Ill., "516.) The mortgagor's title is then freed from the title "of the mortgagee, and he is owner of the premises, not "by any new title, but by the title which he always had. "Statutes of limitation do not transfer title from one to "another, and a statute of limitation which would have "the effect of transferring the legal title back from the "mortgagee to the mortgagor would be unconstitutional "(*Newland v. Marsh*, 19, Ill., 376). The title of the mort-"gagor becomes perfect because the title of the mort-"gagee is measured by the existence of the mortgage "debt or obligation and terminates with it. *Barrett v.* "*Hinckley supra.* According to these well established "rules of law, Benjamin S. Prettyman was the owner of "the premises in question when the notes secured by the "trust deed became due, except as against the title held "by the trustees for the purpose of enforcing payment of "said notes."

By an examination of the autorities cited by the court in that part of its opinion above quoted, it will be found that they fully sustain the court in what they said. In addition thereto this court will find the same doctrine announced in *Sargent v. Howe*, 21 Ill., 148, and *Van Sant v. Allmon*, 23 Ill., 30; both of which were chancery proceedings and decided in 1859. It has been the law of Illinois from the earliest time to the present day that instead of the title of the mortgagee becoming "absolute" on condition broken, he at no time has the "absolute" title, but that the title, or fee, as it is sometimes spoken of, conveyed to him by the mortgage, is a base or determinable fee the term of its existence being measured by that of the mortgage debt, and that independent of the debt he has no title.

Even this honorable court, as far back as 1824 in Hughes *v.* Edwards, 9 Wheat, 497-500, in determining whether the mortgagee or mortgagor was the real owner of the premises mortgaged, held that the mortgagor was

in reality the owner of the land, subject only to the lien. "So much the owner," says the court, "that he is not ac- "countable for the rents and profits received by him dur- "ing the continuance of his possession even although "the land, when sold, should be insufficient to pay the "debt."

And in Hutchison *v.* King, 1 Wall, 53, in determining the rights, title, interest and estate which the mortgagor and mortgagee respectively held in and to the mortgaged premises, this honorable court speaking through Mr. Justice Field said: "A mortgage is in *form* a convey- "ance vesting in the mortgagee upon its execution a con- "ditional estate which becomes absolute upon breach of "condition. At law it was *originally* held to carry with "it all the rights and incidents of ownership, the right of "the mortgagee to be treated as owner of the mortgaged "premises could only be defeated upon the performance "of the condition annexed by the day designated. Subse- "quent performance only gave a right to the mortgagor "to resort to a court of equity for relief from forfeiture "arising upon breach of condition. Such is the law at "this day in some of the States of the Union. But in a "majority of the States the law in this respect has been "greatly modified by consideration drawn from the ob- "ject and intention of the parties in executing and re- "ceiving instruments of this character. The doctrine es- "tablished by courts of equity, looking through the form, "to the real character of the transaction, that a mort- "gage is a mere security for a debt and creates only a "lien or incumbrance, and that the equity of redemp- "tion is the real and beneficial estate in the land, and "may be sold and conveyed in any of the ordinary modes "of transfer subject only to the lien of the mortgage has "to a great extent by 'a judicial and almost insensible "progress,' as Kent observes, been adopted by courts of "law. To such a degree has this equitable view prevailed "that the interest of the mortgagee is now generally "treated by courts of law as real estate only so far as it "may be necessary for the protection of the mortgagee "and to give him the full benefit of his security. Al- "though in the absence of stipulation as to the posses-

"sion, he may enter upon the premises, his interest is "widely different from that of owner. He can not, by "conveyance, transfer any interest in the premises with- "out a transfer of the debt secured. His interest is not "subject to attachment or seizure on execution, he can "not remove the buildings on the premises, nor the fix- "tures attached, nor can he subject the premises to any "use but such as may furnish the means for the payment "of the debt secured without impairing the value of the "estate."

The title, interest or estate which the mortgagee holds under the mortgage, lacks every element incident to the title, interest and estate of the "real" or "absolute" owner; while that of the mortgagor both before and after condition broken has attached to it every incident of absolute ownership.

Let us now consider some of the other propositions which are made the basis of their brief and argument. We invite the court's attention to Division 7 on page 12 of their brief and argument (No. 1). There they say:

"If said statute of 1872 be held unconstitutional or "inapplicable to effect her rights under the mortgage, "or if it were given a construction within constitutional "limits as a statute of limitations—for instance, that "unless the master's deed be taken within the time lim- "ited no deed shall be thereafter issued—plaintiff in "error can maintain her bill and was entitled to the "relief prayed. She had a vested equitable title from "and after January 27, 1881, as *cestui que trust* under "the mortgage trust deed as purchaser and certificate "holder in possession, absolutely entitled to a deed of "the legal title. And she had the legal title by convey- "ance from the heirs at law of the trustee in the mort- "gage deed. She is therefore entitled to have the cloud "created by Prettyman's deed to defendant in error "removed, and defendant in error enjoined from further "asserting the said title against her at law."

(No. 2) Again on page 19 of their brief and argument they say:

"The *cestui que trust* in a trust deed after condition "broken is in equity the absolute owner of the title, just

"as at law the trustee is. Consequently, the plaintiff in "error, after breach of condition, was in equity the "absolute owner of the title and right of possession, as "she would have been at law had she been the mortga- "gee, and her possession after condition broken was the "rightful possession of the mortgagee."

(No. 3) Again at the bottom of page 25 and top of page 26 of their brief they say:

"By the law of the mortgage contract the legal title "outstanding in the trustee in the mortgage deed, after "the sale, was held in aid, and in trust for the pur- "chaser at the sale, in case there was no redemption "from the sale within the time limited. The mortgagor "has not any interest therein after his right to redeem "has expired. Moreover, in the foreclosure suit here "the trustee in the trust deed, Johnson, who held the "legal title was not made a party to the suit. The legal "title in him therefore was not affected by the decree "of sale. That legal title was conveyed by his heirs to "Mrs. Bradley."

(No. 4) Again, on pages 44 and 45, of their brief, they say:

"By the law of the land at the date of the breach of "condition in the McCune mortgage the legal title "became vested in the trustee, Johnson, for use of "plaintiff in error. She therefore had a vested equi- "table title to the land. She was entitled to possession, "which she secured without objection. She might have "proceeded to acquire the legal title by advertisement "and sale, or by foreclosure in equity. She chose the "latter course in hopes of securing other relief also. She "prosecuted her foreclosure to decree and sale, became "the purchaser, and secured a certificate of purchase; "here the effort to secure the legal title seems to have "ended, no one knows why. It is now claimed by "defendant in error and declared by the Supreme Court "of Illinois, that the proceedings to foreclose superseded "the authority to the trustee to sell and convey the "legal title, and this may be true. If so, then plaintiff "in error can never secure the legal title, and must be

"content with the equitable title she held as *cestui que* "*trust*, and which she has protected by maintaining her "possession and by purchasing at the master's sale. "This was done in aid of her equitable title and not in "derogation of it."

Here are some singular propositions both of law and fact to say the least. And they are none the less singular on account of what they contain than they are on account of what they attempt to exclude from the consideration of the case, namely, the effect of the foreclosure and sale in all its bearings. (We have numbered these propositions 1, 2, 3 and 4 for easy reference.) The last part of number 1 and 3 in their practical effects involve the same matter which is a question of fact as to whether or not Johnson, the trustee, was a party to the foreclosure proceedings and bound by the decree therein. By reference to the bill in this case the court will see (P. R., top page 7) that she avers that the bill which she filed in March, 1872, in pursuance of which the trust deed was foreclosed, was "against Prettyman, McCune and *all* other persons interested in said real estate." As Johnson was trustee in the trust deed on the identical land this averment is equivalent to saying he was a party to the foreclosure proceedings. But to forever settle that matter the State Supreme Court found he was a party to the foreclosure suit and bound by the decree, that thereafter he had no interest in the premises and that the deed from his widow and heirs conveyed no title, 186 Ill., 530. But if their contention was true that the deed from the widow and heirs of Johnson conveyed to her the legal title then she had a complete defense to the ejectment suit and no cause for filing the bill in equity, as a judgment in bar in the ejectment suit against the plaintiff's title under the deed from Prettyman would as completely remove that deed as a cloud on her title as would a decree in chancery.

She claims she had a vested equitable title as *cestui que trust* under the mortgage trust deed as purchaser and certificate holder in possession absolutely entitled to a deed of the legal title, and if the statute was con-

strued so as to only cut off her right to a deed if not taken within five years it would not be unconstitutional and she could maintain her bill. We respectfully submit that is precisely the construction the court gave the statute. The proposition which is here made practically admits that she must have the right to demand the deed which will convey to her the legal title, in order to support her alleged equitable title, and when she is no longer able to demand such a deed, she no longer has an equitable title upon which to maintain her bill. There is no way and never has been any way suggested, by which the legal and equitable title to the land can be permanently separated under the conditions existing in this case. Proposition No. 2 and the argument which is based upon it has no bearing on the case for the reason it entirely ignores the foreclosure proceeding and its effect, and we will not take up the time of the court in discussing it. By Proposition No. 3 they claim in effect that the legal title still remains in the trustee notwithstanding the foreclosure and sale and that he held the same in trust for the purchaser at the sale in case there was no redemption. (Evidently they realized the legal and equitable title can not be permanently separated without the intervention of a trust, hence this claim.) And the fourth proposition is that notwithstanding it may be true that the foreclosure proceedings superseded the authority of the trustee to sell and convey the legal title and that she can never secure the legal title she still has the equitable title as *cestui que trust*. In other words, that the foreclosure proceedings and sale and her purchase thereat did not change her relation to the property. It is upon these several propositions that she bases her claim or right to maintain her bill.

In determining what rights, if any, the plaintiff in error had, in the premises at the time she filed her bill in this cause, we do not see how the effect of the foreclosure and sale and her purchase thereat can be ignored. There certainly was some change in the relation of the parties to each other and to the premises effected by those proceedings. Without the trust deed she could not

have gone into chancery and obtained any relief in the foreclosure suit. It was that instrument which gave the court jurisdiction to enter the decree of foreclosure and sale and it is a general rule that by decree in chancery the contract or instrument upon which the proceedings are based become entirely merged in the decree. That by the judgment of the court it loses all its vitality and ceases to bind the parties to its execution. Its force and effect are then expended, and all remaining liabilities are transfered to the decree. When the decree is executed by a sale of the land the only use and purpose of the decree is to show the authority which the master had to make the sale in support of the title acquired by the master's deed.

It is true that when default was made she had several remedies which she might have pursued to collect the debt and apply the land toward its payment, and it is also true that she might have pursued one or more of these remedies at the same time; but she could only have one satisfaction, and whether the doctrine of merger applies or not, when the decree of foreclosure and sale was entered and the land sold, all rights and remedies under the trust deed were exhausted and the mortgage lien extinguished. *Seligman v. Laubheimer*, 58 Ill., 124; Ogle *v.* Koerner, 140 Ill., 170; State Bank *v.* Wilson, 4 Glim., 57; Kilgore *v.* Wood, 64 Ill., 345; Davis *v.* Dale, 150 Ill., 239; Smith *v.* Smith, 32 Ill., 198.

In *Seligman v. Laubheimer, supra*, the court said:

"Without determining the effect of a mere foreclosure, "we do hold that the decree, followed by sale of the "premises, extinguished his mortgage. Plaintiff in error "obtained his decree, caused a sale, because the pur- "chaser, received his certificate of purchase, and then "procured an award for a special execution to make the "residue of the debt; by these acts the mortgage lien was "extinguished. The intention to merge the lien is "clearly deducible from them."

If the language of the court above quoted had been expressly used for this case it could not have fitted the facts any closer. In the case at bar the plaintiff in error obtained her decree, caused a sale, became the purchaser,

received her certificate of purchase, and procured in the decree (P. R., p. 36), that McCune, who was personally liable for the payment of the deficiency should still remain so liable. The other cases cited in our brief are equally as strong. That this court may have ready reference we will quote what the Supreme Court said in some of them. *Ogle v. Koerner supra* 179:

"A mortgage or, as in this case, a deed of trust in the "nature of a mortgage, vests in the party secured a lien "on the mortgage premises. By virtue of the lien the "mortgagee is entitled to have the mortgaged property "sold under a decree of foreclosure and the proceeds of "the sale applied to the payment of the debt secured. "This is the mode provided by law for the enforcement "of the lien, and when the lien has been once enforced "by the sale of the property it has, as to such property, "expended its force and accomplished its purpose and "the property is no longer subject to it."

In *Davis v. Dale, supra*, 243:

"By virtue of the lien created the mortgagee or *cestui* "*que trust* had the right to have the security foreclosed "and the property sold and the proceeds applied in pay- "ment of the secured debt. But when this has been done, "and the lien enforced by a sale of the property, and the "proceeds applied, the mortgage or trust deed has ex- "pended its force and the property is no longer subject "to its provisions (Ogle *v.* Koerner, 140 Ill., 170. Selig- "man *v.* Laubheimer, 58 Ill., 124). Nor does it in any "way affect the result that the holder of the secured in- "debtedness becomes the purchaser at the sale whether "he be the mortgagee or *cestui que trust* or not. By be- "coming the purchaser a new relation created by the "statute exists in no wise dependent upon any privity of "contract between the purchaser and mortgagor."

These decisions of the Supreme Court and others which we have cited in our brief, and still others to the same effect which are referred to in the opinion of the Supreme Court, which the bill complains of, were not rendered in view of the statute of 1872. Many of them were rendered long before either the McCune trust deed or the statute was ever thought of. What was the

Supreme Court to do in Lightcap *v.* Bradley. Overrule its former decisions, because, forsooth, if the court followed the principles of law which it had before announced and which were firmly implanted in the jurisprudence of the State, recognized and enforced as such for more than half a century, the plaintiff in error, by reason of her failure to obtain a deed which she was entitled to, through no fault except her own, would lose the land? Or was the court to follow settled principles of law upon which the people of the State had for generations depended? Happily, the day is past when courts will place the interests of the individual suitor above that of the whole people and will manufacture law to suit the individual case.

It is for the reason that the State Supreme Court saw fit to follow principles of law firmly settled and fixed in the jurisprudence of the State, rather than overrule them or make a departure into unexplored fields, that this case is before this court. On pages 58 and 59 of their brief they admit the State Supreme Court regarded its former decisions as the rule for its decision in Lightcap *v.* Bradley, but they contend that the Supreme Court misconstrued the force and effect of its former decision, hence it is inferentially argued that this court should correct the State Supreme Court in its misconception; but no authority or decision of the Supreme Court of Illinois, which holds a contrary doctrine to that announced in the opinion is cited. Upon principle and authority the learned judge who wrote the opinion well said:

"It is absurd to say that a mortgagee by neglecting "or refusing to take a deed by the expiration of five "years can thereby reinstate himself in the same posi- "tion as before the purchase. The land being freed "from the lien of the trust deed by the sale, the title "of the trustee was gone, and the only interest of the "defendant (plaintiff in error) was by virtue of the cer- "tificate of purchase. The sale of premises under a decree "of foreclosure, when the decree does not expressly "save any right to resort to the land again, is an abso- "lute discharge of the premises from the lien. In the

"absence of a provision for another sale the premises "will be discharged even from unmatured portion of "the debt. *Raines v. Mann*, 68 Ill., 264. Such a sale is "a sale of the land and all interests, both that which "the mortgagor had at the execution of the mortgage "and the interest of the mortgagee, and all other par- "ties to the suit. It is made by the court as vendor and "the sale discharges the land from the lien and trans- "forms it into the statutory lien by the certificate of "purpose. (Smith *v.* Smith, 32 Ill., 198.)"

When the land was sold that was the end of the trust deed and all rights thereunder. Mrs. Bradley, although she was the holder of the secured indebtedness, did not acquire by the purchase any greater, any other, or any different rights than any stranger would who might have been purchaser. *Davis v. Dale supra.* Thereafter she stood in the same position and sustained the same relation to the property and to the mortgagor as any other purchaser; no better, no worse. She no longer had any right to the possession whether her possession before was rightful or not. From and after the sale her rights were measured by the certificate of purchase under the statute the same as any other purchaser. The certificate of purchase did not convey or purport to convey or vest in her or the holder of it any title to the premises nor give any right to the possession thereof. The right to the possession after the sale was in Prettyman, the grantee of the mortgagor, and would remain in him until his title was transfered by the master's deed. The certificate of purchase was assignable at any time, either before or after redemption, by simple indorsement on the back thereof. (Revised Statutes of Illinois, Chap. 77, Sec. 29.) And an assignment of it would vest in the assignee the right to receive the redemption money or deed in case of no redemption, and it could be transferred to successive assignees as long as it had vitality, and each successive assignee would succeed to all the rights of the party to whom it was first issued, and a deed to any other party than the holder of it would be void and pass no title. Carpenter

v. Sherfy, 71 Ill., 427, 429. Even if the decree in the foreclosure suit had expressly provided that Mrs. Bradley should continue in possession of the premises after the sale and before obtaining a deed, it would have been reversible error. There was no way by which the mortgagor or his grantee could be deprived of his right to the possession until deed is made except by the appointment of a receiver, no other way is known to the law of Illinois. As far back as 1850 in McLane *v.* Brown, 11 Ill., 523, the Supreme Court of Illinois in determining the rights which the purchaser at execution sale and judgment debtor respectively had in land after sale and expiration of redemption, speaking through Mr. Justice Caton, said:

"In this State, at least, the principal estate continues "in the judgment debtor after the sale on execution, so "long as the equity of redemption continues, and, in- "deed, until the sheriff's deed is executed."

Again, in Bennett *v.* Matison, 41 Ill., 344, the Supreme Court, speaking through Mr. Justice Breese, said:

"No case can be found where a party has been put "in possession who was a purchaser at a judicial sale "before a deed has been executed to him by the officer "selling. Until he obtains a deed he is for most pur- "poses a stranger to the possession."

Indeed it is a well settled principle of the law of Illinois that a certificate of purchase is only a lien, that no title vests in the holder theerof, until he acquires the sheriff's or master's deed, and that the title of a judgment debtor or of a mortgagor is not divested until the deed is executed. This question has been passed upon by the Supreme Court of Illinois in a number of cases, many of them long before the McCune trust deed was even thought of, among which is Johnson *v.* Baker, 38 Ill., 98, decided at the April term, 1865, in which the court held that until the holder of the certificate of purchase acquires the Sheriff's deed after redemption expires, he is only regarded as a bidder. So in Stephens *v.* Illinois M. F. Ins. Co., 43 Ill., 327, decided January term, 1867. The Supreme Court states the law to be that the pur-

chaser under a master's sale on foreclosure of a mortgage acquires no title until the deed is made. That while the deed will relate back to the beginning of the lien in order to cut off intervening incumbrances, yet it will not carry back the absolute divestiture of title, and that until the deed is made the mortgagor still has the estate of a mortgagor with the qualification that the amount and time of redemption has been absolutely fixed by the decree and sale.

In the case of Bennett *v.* Matson, 41 Ill., 322, April term, 1866, the court holds that a purchaser at a judicial sale is not entitled to possession before the deed is executed, that until he obtains his deed he is for most purposes a stranger to the possession.

These cases are followed by Rockwell *v.* Servant, 63 Ill., 424, decided at the January term, 1872, declaring the same principal, and at the September term, 1873, in Hays *v.* Cassell, 70 Ill., 669, 672, the court recites the law in these words: "The certificate of purchase con-"veyed no title to the purchaser, nor did it disturb the "possession of the defendant. That title continued in "him, and would remain until fifteen months had elapsed "*and his title transferred by the sheriff's deed.*" So in O'Brien *v.* Fay, 82 Ill., 277, the court says: "By our "law the defendant is entitled to the possession between "the day of sale and the making of the master's deed." In the case of Lightcap *v.* Bradley, 186 Ill., 510, the cases are carefully reviewed by the court, and the court there finds the law of Illinois to be as we have stated. How could it be otherwise, there is no provision in the statute or law of Illinois that a certificate of purchase shall transfer title, nor does the certificate itself purport to pass any title either in fee, remainder, reversion, a term of years, or any other estate. On the contrary, it negatives the very idea of a transfer of title by telling the holder of it when he will be entitled to a deed if the property be not redeemed. As was said by the State Supreme Court in Johnson *v.* Bantock, 38 Ill., 114: "It "contains no words which impart a grant, release or "transfer of the land, or title this to every deed of con-

"veyance is essential. It is only by apt and proper "words and language that title can be passed or trans- "ferred from one person to another." The certificate only purports to give the legal holder of it a right to have the title transferred to him by deed at the expiration of the period of redemption if the property be not redeemed. At the expiration of fifteen months, when redemption expires, the holder of a certificate has the right to dmand a deed at any time within the statutory limitation of five years, which deed, when executed will transfer the title which the mortgagor had at the time the mortgage was executed, to the recipient of the deed, but the holder of the certificate is never vested with title, and the title of the mortgagor is never actually divested until the master's deed is executed, and the holder of the certificate can not be compelled to take the deed if he does not want it.

IV.

The bill on its face shows, that under the law of Illinois, the plaintiff in error had no legal or equitable title to support her bill.

In a former part of our argument we said this statute complained of was a limitation statute and so held to be by the State Supreme Court in the first seven cases cited in our brief, but that we should have occasion to call the court's attention to them in a subsequent part of our argument we passed them without comment. We now invite the attention of the court to them, not only to show that the Supreme Court holds it to be a statute of limitation, but also to show, in addition to the authorities already cited, that when her right to a deed became barred by the statute, she thereafter had no right, title, claim, or interest in the land either in law or equity. Let us take them up in their order.

Ryhiner *v.* Frank, 105 Ill., 326, was an action of ejectment. Ryhiner commenced an action of ejectment against Frank to recover certain lots in Effingham. One Newbank was the common source of title.

One source of the plaintiff's title was a sheriff's deed executed to him on a certificate of purchase from the sheriff, who had sold the lots under execution on a judgment *r.* Newbank rendered on the 6th of March, 1871, upon which execution issued and the land sold Aug. 7, 1871, the judgment was rendered while he owned property, and prior to a trust deed which he gave on the property. The property was sold under the trust deed and the defendant connected himself with the title under this sale. No deed was taken out on the sheriff's certificate of purchase until Dec. 21, 1878, at which last date Ryhiner, to whom the certificate of purchase had been assigned, received a sheriff's deed. This was upward of five years and ten months after the expiration of the time of redemption, and the objection was made in that case as in this, only with much stronger reasons that the statute did not and could not apply, that rights were vested in the holder of the certificate prior to the passage and taking effect of the statute. And that as the sale was made and certificate issued in 1871, nearly a year before the act of 1872 went into effect, and at that time there was no express limitation limiting the time when deed could be taken out, and as the court had declared in Rucker *r.* Dooley a deed might be issued at any time within eight years and three months after sale, or seven years after expiration of redemption, to apply the statute of limitation subsequently prescribed, deprived the holder of the certificate of vested rights; but the court held otherwise. Mr. J. Sheldon, speaking for the court as a unit said (330):

"The objection is not valid that the statute fixes a "limitation for taking out the deed, different from that "declared by this court in Rucker *r.* Dooley, 49 Ill., 383, "and that the judgment and sale under it were prior "to the passage of the statute. The statute was one "of limitation and effected only the remedy. It took "away no vested right and like all other statutes of "limitation, was free from objection on this score, where "a reasonable time, as was the case here, is left for the "pursuit of the remedy. It was surely competent for

"the legislature to change the time of limitation which "had previously been declared by this court."

Again in Peterson *v.* Emmerson, 135 Ill., 55, 59, 60. This was a bill in chancery by Elizabeth Emmerson to compel the master in chancery to execute a deed on a certificate of purchase which had become barred by this same section of the statute which bars the plaintiff in this case.

In 1865 one Peterson, the then husband of Mrs. Emmerson, gave a mortgage to one Emmerson on 40 acres of land to secure an indebtedness. She joined in the execution of the mortgage. Peterson died in 1866 leaving his widow and two children by a former wife, a son and daughter, the daughter married Hiram Smith, and died leaving an infant child in 1867. Peterson's widow married Emmerson, the mortgagee. She resided on the land during her widowhood and for a time after she married Emmerson, when they moved off of it. In 1871 Emmerson foreclosed his mortgage, and on November 25, 1871, the master in chancery sold the land under the decree of foreclosure and Mrs. Emmerson bid it off and received the certificate of purchase. In 1872 she took possession of the premises and continued in possession, received the rents and profits, and paid all taxes, and was in possession at time she filed her bill, but no deed was ever executed on the certificate of purchase. Fifteen years, 10 months, and 11 days elapsed after the expiration of the period of redemption, and the filing of the bill.

It was urged (see Ab. of Argument, pp. 56, 57) that the statute of 1872 did not apply because the sale was made and certificate of purchase issued before the statute was enacted; also that the rights of the parties were not affected or changed by the decree of foreclosure and sale thereunder. That the decree of foreclosure was still in force and that the title of the heirs of the mortgagor were divested by their failure to redeem, that even if the certificate of purchase was dead for the purpose of getting a deed, still the whole suit of foreclosure, decree and sale was left unimpaired. That Mrs. Emmerson had everything she

needed including the possession of the land except the evidence of her title. That she was the owner of the property in equity, but lacked evidence of it. The circuit court sustained her contentions, and the heirs of the mortgagor took the case to the Supreme Court of the State. Mr. Justice Baker delivered the unanimous opinion of the court and after reaffirming what was said by the court in Ryhiner *v.* Frank *supra* said pp. 59, 60: "It is also urged that it lies within the "general equity powers of the chancery court to order "and decree that the master should execute and deliver "to defendant in error a conveyance of the land, predi- "cated upon the foreclosure sale of November, 1871, and "Rucker *v.* Dooley, 49 Ill., 377, and Schrader *v.* Peach, "77 Ill., 615, are cited as authority in that behalf.

"Rucker *v.* Dooley was decided prior to the enactment "of 1872 and when there was no express legislation on "the subject, and the court there formulated, based "upon the analogies of the law, a rule which it deemed "equitable and just. That rule was, that the lapse of "twenty years from the date of sale and certificate was "an *insuperable* bar to the execution of a deed; that "after the expiration of fifteen months allowed for re- "demption, and within eight years and three months "from the date of sale, a deed should be made by the "proper officer upon presentation of the certificate of "purchase, and that after the eight years and three "months had elapsed, and within twenty years, a deed "*might* be made upon an order of court entered after "notice to parties interested. But this rule was abro- "gated by the legislative enactment of 1872, not only "in respect to the period of limitation, but also by the "provision that if a deed was not taken out within the "time limited, the certificate should be null and void. "It is sticking in the bark to say, that notwithstanding "the certificate is null and void, yet the *sale* which it "was given to evidence has such vitality and force that "a court may decree, by virtue thereof, the preemptory "and absolute transfer by its officer of the property and "title of one person to another and different persons. "It does not alter the case that defendant in error has

"been in actual possession of the land since 1872 claim-
"ing ownership and has paid all the taxes assessed
"thereon. Such acts do not take the case out of the
"statute as to justify the transfer to her of the legal title
"vested in the heirs of the mortgagor."

The question was before the Supreme Court again in Seeberger *v.* Weinberg, 151 Ill., 369, 373-4, 380-1.

It was a bill in chancery by Seeberger, against the heirs of the mortgagor and other parties. The substantial facts so far as this case is concerned are as follows. Seeberger being the owner of the lot in controversy conveyed the same to one John Farr, on June 3, 1872, for $1,700. $900 of the purchase price was secured by Farr executing three notes to Seeberger for $300 each, and secured the same by trust deed on the lots to one Hodges as trustee. In 1873 Farr conveyed the lots to his wife, Sarah Ann Farr, and subsequently died. Default was made in the payment of the notes and a bill in chancery to foreclose the trust deeds was filed upon which a decree of foreclosure, was entered in January, 1876; under this decree the lots were sold by the master in chancery February 14, 1876, and Seeberger, the *cestui que trust*, bid the same off, became the purchaser, and received the master's certificate of purchase. No redemption was made, and no deed taken out on the certificate of purchase. From the date of the sale, however, Seeberger claimed the lots and paid all taxes and assessments thereon and built sidewalks on the street adjacent thereto. In 1892 Seeberger contracted to sell the lots to Fanny Weinberg, part of the purchase price was paid and Seeberger was to furnish an abstract of title so that Mrs. Weinberg could have her attorneys examine the same, which was done, and the attorneys discovered that no deed was ever taken out on the certificate of purchase, and so informed Seeberger. Mrs. Weinberg then proceeded to get a deed for the lots from Mrs. Farr and the heirs of the mortgagor, and thereupon Seeberger filed his bill setting up the facts and claiming to own the property, &c., &c. The bill was heard on pleadings and proof and the lower courts dismissed the bill, and on appeal to the Supreme Court the decree was

affirmed. Mr. Justice Bailey delivered the unanimous opinion of the court, and after referring to the statute and to the prior decisions of the court said:

"After the expiration of five years given by the statute "for taking out a master's deed, the certificate of pur- "chase became a nullity, and a court of equity can not "compel, or authorize, the execution of a deed to the pur- "chaser or his assignees by the officer whose duty it is "to make such deed. Such being the condition of Seeber "ger's title it is difficult to see upon what legal or equita- "ble principle he can now be entitled, as against the "grantees of Farr, to any portion of the relief prayed for "in the bill. His certificate of purchase being *functus* "*officio* and void, he certainly could have had no remedy "against the heirs or representatives of Farr if they had "still retained their interest. No remedy could have been "asserted by him upon the certificate as that had become "a nullity, nor could he have enforced any remedy upon "the original mortgage as that remedy had been com- "pletely exhausted by the foreclosure and sale. Here the "interest in the land acquired by Seeberger by means of "his purchase at the foreclosure sale, and evidenced by "the certificate of purchase, having been barred by limi- "tation, the only title to the property capable of asser- "tion was that remaining in the grantee or legal repre- "sentative of Farr, the mortgagor. If Mrs. Weinberg had "not succeeded in securing the title by purchase from "those in whom it was vested, it might have been as- "serted by them, or purchased by some third party to "the exclusion of both her and Seeberger."

Again, in Brown *v.* Ridenhower, 161 Ill., 239. This was a bill in chancery to set aside two deeds under following state of facts. In 1858 one James Finney being the owner of the land executed a mortgage thereon to one Misenheimer to secure the payment of $127.50. In 1863 Misenheimer filed a bill to foreclose the mortgage, he obtained a decree and one Graham was appointed a special commissioner to sell the land, which he proceeded to do on Sept. 5, 1863. Misenheimer was the highest bidder and secured the certificate of purchase, and the special commissioner made a report of the sale,

which was approved. Finney died in March, 1866, without having redeemed the land from the sale. No master's or commissioner's deed was ever issued. Ridenhower was in possession of the land holding the same under a regular chain of conveyances from Misenheimer. In 1892 the heirs of Finney, the mortgagor, conveyed the land to Brown and the bill was filed to set aside this deed as a cloud upon Ridenhower's title, and the court held, Mr. Justice Magruder delivering the opinion, that the holder of the certificate had no title in law or equity to support the bill, and reversed the decree of the lower court granting the relief, and in doing so quoted with approval what was said by the court in Seeberger *v.* Weinberg, and said "whether the lapse of "time is to be given the effect of extinguishing his right, "or merely barring his remedy, he has no further title or "interest in the premises described in the certificate "which either he or his grantee can enforce either in law "or in equity."

The statute complained of has been in force for nearly a third of a century, and for more than one-third of the existence of Illinois as a State. One and only one construction has ever been given to it, viz.: as a limitation statute, and no other effect has ever been given to it in this case or any other, and as was said by this court in Saranac L. Co. *v.* Comptroller, 177 U. S., 330, "a statute of limitation will bar any right, however high the source from which it may be derived, provided a reasonable time is given a party to enforce his right."

V.

The bill shows, and so states that the controversy in the ejectment suit was as to the effect of the statute complained of. The effect of the statute involved its validity and construction, and it is the construction and effect the State Supreme Court gave it that forms the chief ground of complaint in the bill.

It is because the State Supreme Court did not agree with her, in her version of the laws of Illinois relating to mortgages, and the effect of a valid foreclosure and sale,

and in the construction and application of the statute complained of, that she seeks the aid of the equity side of the State Circuit Court. But how, and in what way was that court to aid her? If that court found the law of Illinois to be, as the Supreme Court of the State says it was and that the statute complained of, was correctly construed and applied, it would necessarily have to deny her the relief asked for, It could only grant her the relief on finding that the State Supreme Court erred in its judgment as to the law and its application. What was this, more or less, than making a Court of Review out of the State Circuit Court as a court of equity to review and correct alleged errors made by the Supreme Court of the State, on the ground, that such errors, if they existed, contravened some provisions of the Federal Constitution.

We have been unable to find any authority which would bring the object and scope of the bill in this case within the jurisdiction of the Circuit Court, and we were cited to none, by the learned counsel representing appellant, when the case was presented in the lower court, and to none in this court. It is new doctrine that an inferior court of the State can sit in review upon the findings and judgment of the Supreme Court.

The State Circuit Court has no supervisory power over the State Supreme Court. The supervisory power is just the reverse. There is not a question of fact, or law, presented in the bill or amended bill that was not, or might not, have been presented upon the record in the ejectment suit, at the first trial of the same. In fact, the decision of the Supreme Court, in the ejectment suit, upon the questions which were actually and directly presented to that court for its determination and judgment, is made the basis of the bill, and is the only ground on which the claim of a Federal question rests, and it is because the State Supreme Court did not observe the Federal Constitution in the ejectment suit, according to her ideas that she files the bill. There is, and can be no question raised as to the jurisdiction of the State Supreme Court. In fact, the subject-matter in dispute, and the parties were peculiar within its jurisdic-

tion, and having litigated the question in a competent tribunal, and been defeated, can she litigate the same questions in another tribunal, acting independently and having no appellate jurisdiction? As was said by this court in Forsyth *v.* Hammond, 166 U. S., 516, 518: "The "question is, not whether the judgment of the Supreme "Court would be conclusive as to the questions involved, "in another action, between other parties, but whether it "is not binding between the same parties in that, or any "other forum? The principles controlling the doctrine "of *res judicata* have so often been announced and are so "universally recognized, that the citation of authorities "is scarcely necessary. Though the form and cause of "action be different, a decision by a court of competent "jurisdiction, in respect to any essential fact, or ques- "tion, in the one action, is conclusive between the parties "in all subsequent actions."

It is no answer to the application of the principle *res judicata* that the question sought to be raised by the bill was not raised, or was not raised in such a way, or form, as would permit of a reexamination and review of them by this court. The principle applies, not only to points upon which the court was actually required to form an opinion, or pronounce judgment, but to every point which properly belonged to the subject-matter of litigation, and which the parties might have brought forward at the time. In Beloit *v.* Morgan, 7 Wall., 621, this court, speaking through Mr. Justice Swain, said: "It extends not only to the question of fact and law, "which were decided in the former litigation, but also "to the grounds of recovery or defense which might "have been, but were not presented."

That she did not make and preserve in the record in the ejectment suit, on its first trial in the State Circuit Court, and in the State Supreme Court on the appeal, the questions which would permit of this case being brought into this court by writ of error, does not militate against the application of the doctrine of *res judicata*. She might have done so.

By the bill she deliberately avers, and admits, that every claim and right, to the lands, which she has, was

presented in and by the record of the trial of the ejectment suit, and was presented to the Supreme Court. In the bill, P. R., p. 15, will be found this deliberate statement: "But oratrix will not be able at that trial (i. e., retrial of the ejectment suit), to offer any other or different defense than she has already presented, and under the decisions of the Supreme Court of Illinois, construing and applying the said act of 1872 to deprive her of vested property, and contract right, the result of such trial must, necessarily, be adverse to oratrix, and result in a judgment from which she could not obtain relief, unless the court shall grant the relief herein prayed, and defendant be enjoined from the further prosecution of said suit." It will be seen that the reason she files her bill, is because the State Supreme Court, in construing and applying the act of 1872, "deprived her of vested property and contract right." If that is true, then the Federal question is to be found in the proceedings in the ejectment suit and must be determined in the suit in which it arose, and not in an independent suit for the purpose. If the statute violates the Federal Constitution, or if a certain construction of it renders it obnoxious to that instrument, the courts of law of the State have perfect authority to so declare, and it is their duty to so declare in any proceeding where the validity of the statute, or its construction, arises, and if the highest court of the State erroneously upholds it, or places a construction upon it which renders it obnoxious to the Federal Constitution, the remedy of the party aggrieved is by writ of error, from this court to the State Supreme Court, as provided by Sec. 709, Chap. 11, Title 13, of the Revised Statutes of the U. S., which affords a complete and adequate remedy at law, so that a court of equity would have no jurisdiction to inquire into the validity of the statute, or the application or construction of the same, by the State Supreme Court, which was the subject-matter under consideration, in litigation already begun and then pending in a court of law. Nor does her failure to properly raise and preserve the Federal question in the proceedings at law, authorize a court of chancery to interfere, nor render

any the less conclusive upon the State Circuit Court, the decision of the State Supreme Court. Johnson Co. *v.* Wharton, 152 U. S., 252, 256, 260 and cases cited.

The principles of law announced by the State Supreme Court, on the appeal in the ejectment suit, became the law in the case, binding alike on all courts, even the State Supreme Court, on second appeal, until reversed by this court which alone has supervisory power over the decision of that court.

In Manufacturing Co. *v.* Wire Fence Co., 119 Ill., 30, 42, the Supreme Court of Illinois, in passing upon the conclusiveness of a prior decision in the same case said: "We are not at liberty to review and overrule any former "ruling in the case. It is well settled, and, as we under- "stand, not denied by counsel for appellant, first, where "a question of either law or facts, is decided by this court "in a case properly before it for such decision, the same "question can not be again raised in that case, except "upon petition for rehearing; second, where a case has "been heard in the trial court, reviewed in this court "and remanded to the trial court with direction as to "the decree it shall enter, on a subsequent appeal to "this court, error can not be assigned for any cause that "existed prior to the former decision in this court."

In Reid *v.* West., 70 Ill., 479, the Supreme Court expressly declared that "it has no power to review its "previous judgment, except upon a petition for a re- "hearing, presented in accordance with the rules estab- "lished for that purpose."

The reports of the decisions of the Supreme Court of Illinois contain numerous decisions of that court, that a second appeal in the same case, where the first decision covers the merit of the controversy, brings up only the subsequent proceedings had after the mandate of the court of last resort was sent down. This also is the doctrine held by this court, a case illustrative of which is Washington Bridge Co. *v.* Stewart et al., 3 How., 424, 425, where this court announced the same principles as are announced by the Supreme Court of Illinois. It is manifest upon the face of the bill that the object and purpose for which it was filed, was to get the alleged

Federal question which arose in the ejectment suit, and which she had failed to preserve in such a way as to bring before this court on writ of error, and which would be *res adjudicata* on a second appeal of the ejectment suit, in some shape or form before this court.

It is a settled rule that where a party has a right which he might have enforced through the aid of a court at law, but instead of calling upon the court for that purpose, he sleeps upon his rights until his right to call upon the court of law for assistance is barred by the statute of limitation, a court of equity will not thereafter afford him any relief; also that where there is a legal and an equitable remedy in respect to the same subject-matter, the latter is under the control of the same statutory bar as the former.

In Metropolitan National Bank *v.* St. Louis Despatch Co., 149 U. S., 448, this court said: "Courts of equity in cases of concurrent jurisdiction consider themselves bound by the statute of limitation which governs actions at law."

And this is repeated with approval in Baker *v.* Cummings, 169 U. S., 206.

Applying these principles to the facts in this case, what is the result? Her bill shows that she had the right to demand a deed for the land in controversy on the 28th day of January, 1881, and thereafter at any time within the next five years. The deed, when executed by the master, would have as completely and perfectly vested in her the absolute title and estate in the premises, and would have been as perfect and complete protection to her, as the relief which she now asks for at the hands of the chancellor; and further she had, during the entire term of five years, the unquestionable right to compel the execution of the deed by *mandamus* which afforded her a full, perfect and complete remedy at law.

Now having failed through her own negligence to seek the remedy which the law offered her, until her right to resort to that forum is barred by the statute, what valid excuse does she offer for her laches? We fail to find any in her bill, and none has ever been called to our atten-

tion. There is no valid excuse, and now to call upon a court of equity to grant the relief prayed for, is nothing short of asking that court to annul the mandate of the statute complained of.

As the correctness of the decision of the State Supreme Court which the bills attack, is involved and will form one branch of Bradley *v.* Lightcap, No. 243, on the docket of this court, and this case is to be heard with that, we deem it unnecessary to repeat what we have said in regard to the opinion and laws of Illinois in our brief and argument in that cause, but will ask the court to consider the same as though repeated herein.

We submit, the State Supreme Court made no error in its judgment and decree, and that its decree and judgment should be affirmed, or writ dismissed in accordance with the practice of this court.

Respectfully submitted,

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